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**A.W. Farrell & Son, Inc. and United Union of Roofers, Waterproofers, and Allied Workers, Local 162 and Sheet Metal Workers International Association, AFL-CIO, Local Union No. 88, Party in Interest**

**United Union of Roofers, Waterproofers, and Allied Workers, Local 162 and A.W. Farrell & Son, Inc.** Case 28–CA–085434, 28–CB–080496, and 28–CB–085690

July 1, 2015

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On May 13, 2013, Administrative Law Judge Robert A. Ringler issued the attached decision. The General Counsel, United Union of Roofers, Waterproofers, and Allied Workers, Local 162 (Roofers Local 162), and A.W. Farrell & Son, Inc. (Farrell) each filed exceptions, a supporting brief, and an answering brief, and Farrell filed a reply brief.<sup>1</sup> The Party in Interest, Sheet Metal Workers International Association, AFL-CIO, Local Union No. 88, filed a brief supporting Farrell's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions except as specifically set forth below, and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> The General Counsel's exceptions and briefs were limited to Cases 28–CB–080494 and 28–CB–085690. He did not file exceptions or briefs in Case 28–CA–085434.

<sup>2</sup> No party filed exceptions to the judge's findings that Farrell violated Sec. 8(a)(1) by maintaining, in its Employee Code of Conduct, a Disciplinary Procedures policy that prohibited employees from engaging in "solicitation/distribution" and/or "conduct deemed inappropriate by the Company," and by maintaining an Electronic Communication policy that prohibited employees from "[r]evealing company private, confidential, copyrighted or employee information in external communications without the required approval."

<sup>3</sup> We shall amend the judge's conclusions of law and remedy to conform to our findings. In addition, we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). There are no exceptions to the judge's recommendation of a broad cease-and-desist Order. Notwithstanding the absence of exceptions, Member Miscimarra would not issue a broad cease-and-desist order because, in its prior

We adopt the judge's dismissal of the complaint allegation that Farrell violated Section 8(a)(5) and (1) of the Act by repudiating its collective-bargaining relationship with Roofers Local 162. The substance of that allegation was litigated and decided in *A.W. Farrell & Son, Inc.*, 361 NLRB No. 162 (2014) (*Farrell I*), incorporating by reference 359 NLRB No. 154 (2013), in which the Board held that Farrell violated Section 8(a)(5) and (1) by refusing to recognize Roofers Local 162 as the 9(a) representative of the unit employees<sup>4</sup> and by repudiating its collective-bargaining agreement with Roofers Local 162. Moreover, the Board's Order in *Farrell I* included the remedies sought by Roofers Local 162 here, including the requirement that Farrell execute and implement the 2010–2012 collective-bargaining agreement negotiated with Roofers Local 162 (2010–2012 CBA) and give retroactive effect to its terms. 361 NLRB No. 162, slip op. at 2.

Roofers Local 162 excepts to the judge's finding that it violated Section 8(b)(3) by failing to furnish Farrell with requested information about its various benefit funds and by unreasonably delaying its provision of other related documents. Roofers Local 162 contends that it had no obligation to provide the information because the 2010–2012 CBA was already in place, and therefore the information was not needed for collective-bargaining purposes. Roofers Local 162 also argues that it sent a letter to the funds asking whether they would provide the information, and that this "good-faith request was enough" to satisfy its obligation under the Act.

We find, contrary to the judge, that Roofers Local 162 was not obligated to provide the requested information. Farrell made its first information request on August 10, 2011, which was more than 3 months after it unlawfully withdrew recognition from Roofers Local 162 and, at the time, Farrell was unlawfully applying a different union's

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decision, the Board issued a narrow Order, 361 NLRB No. 162, slip op. at 2 (2014) (Order par. 1(e)), and Member Miscimarra believes the Board's prior findings and those here — that Farrell maintained two overbroad rules — are insufficient to demonstrate that Farrell has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct that warrants a broad cease-and-desist order. See also *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 2 (2014) ("We have broad discretion to exercise our remedial authority under Section 10(c) of the Act even when no party has taken issue with the judge's recommended remedies."); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996) ("[R]emedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions.").

<sup>4</sup> The unit consists of "[a]ll regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards and supervisors."

collective-bargaining agreement to unit employees. Its request, therefore, did not relate to its employees' terms and conditions of employment and was not presumptively relevant. Nor was the requested information relevant for contract-administration purposes because Farrell believed that its withdrawal of recognition had terminated its collective-bargaining relationship with Roofers Local 162. In these circumstances, we find that Roofers Local 162's failure to provide the requested information did not violate Section 8(b)(3).

Finally, Farrell excepts to the judge's dismissal of the allegation that Roofers Local 162 violated Section 8(b)(3) by failing and refusing to bargain in good faith when, among other things, it unreasonably delayed or canceled bargaining sessions. The judge found that Roofers Local 162's conduct was excused by Farrell's ongoing derogation of its threshold duty to recognize Roofers Local 162 as the 9(a) representative of the Roofers' Unit. On exceptions, Farrell argues that "two wrongs do not make a right," i.e., that its refusal to recognize Roofers Local 162 did not excuse Roofers Local 162's obligation to bargain. See *Quality Roofing Supply Co.*, 357 NLRB No. 75 (2011).

We affirm the judge's dismissal, but for a different reason. As explained above, in *Farrell I* the Board determined that Farrell was obligated to give effect to the terms of the 2010–2012 CBA, which ran from September 1, 2010, through July 31, 2012. Farrell first requested bargaining on January 23, 2012, and the parties met for their only bargaining session on July 14, 2012. Accordingly, the parties had a valid collective-bargaining agreement in place during the entire period that Farrell was seeking to bargain. For that reason, we find that Roofers Local 162 was not obligated to bargain, and therefore that its failure or refusal to do so did not violate Section 8(b)(3).

#### AMENDED CONCLUSION OF LAW

Delete Conclusion of Law 6 and renumber the subsequent paragraph accordingly.

#### AMENDED REMEDY

Having found that Farrell has engaged and is engaging in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Farrell violated Section 8(a)(1) of the Act by maintaining a Disciplinary Procedures policy that prohibited employees from engaging in "solicitation/distribution" and/or "conduct deemed inappropriate by the Company," and by maintaining an Electronic Communication policy that prohibited employees from "[r]evealing company private, confidential, copyrighted

or employee information in external communications without the required approval," we shall order it to cease and desist and to post notices at its Dunkirk and Elmira, New York, and its Erie, Cleveland, and Cincinnati, Ohio facilities, where the unlawful policies have been, or remain, in effect. See *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir. 2007). The standard affirmative remedy for maintenance of unlawful work rules is immediate rescission of the offending rules; this remedy ensures that employees may engage in protected activity without fear of being subjected to the unlawful rules. *Guardsmark*, 344 NLRB at 812. Pursuant to *Guardsmark*, Farrell may comply with the Order by rescinding the unlawful handbook rules and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, Farrell may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will cover the unlawfully worded rules until it republishes the handbook either without the unlawful provisions or with lawfully worded rules in their stead. Any copies of the handbook that are printed with the unlawful rules must include the inserts before being distributed to employees. *Id.* at 812 *fn.* 8.

We shall also order Farrell to post an appropriate notice, attached as "Appendix."

#### ORDER

The National Labor Relations Board orders that the Respondent, A.W. Farrell & Son, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Maintaining the *Disciplinary Procedure* policy in its Employee Code of Conduct at its Dunkirk and Elmira, New York, and its Erie, Cleveland, and Cincinnati, Ohio facilities, which bans employees from engaging in "conduct deemed inappropriate by the Company" or "solicitation/distribution."

(b) Maintaining the *Electronic Communication* policy in its Employee Code of Conduct at its Dunkirk and Elmira, New York, and its Erie, Cleveland, and Cincinnati, Ohio facilities, which prohibits employees from "[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval."

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or modify the language in the following provisions of its Employee Code of Conduct at its Dunkirk and Elmira, New York, and its Erie, Cleveland, and Cincinnati, Ohio facilities:

(1) The *Disciplinary Procedure* policy to the extent that it banned employees from engaging in "conduct deemed inappropriate by the Company" or "solicitation/distribution."

(2) The *Electronic Communication* policy to the extent that it prohibited employees from "[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval."

(b) Furnish all current employees at the Dunkirk and Elmira, New York, and the Erie, Cleveland, and Cincinnati, Ohio facilities with inserts for the Employee Code of Conduct that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised Employee Code of Conduct that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

(c) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Farrell's authorized representative, shall be posted by Farrell and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically such as by email, posting on an intranet or internet site, and/or other electronic means, if Farrell customarily communicates with employees by such means. Reasonable steps shall be taken by Farrell to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Farrell has taken to comply.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. July 1, 2015

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a *Disciplinary Procedure* policy in our Employee Code of Conduct at our Dunkirk and Elmira, New York, and our Erie, Cleveland, and Cincinnati, Ohio facilities that prohibits employees from engaging in "conduct deemed inappropriate by the Company" or "solicitation/distribution."

WE WILL NOT maintain an *Electronic Communication* policy in our Employee Code of Conduct at our Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati,

Ohio facilities that prohibits employees from “[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval.”

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or modify the language in the following provisions of our Employee Code of Conduct at our Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities:

(1) The *Disciplinary Procedure* policy to the extent that it prohibits you from engaging in “conduct deemed inappropriate by the Company” or “solicitation/distribution.”

(2) The *Electronic Communication* policy to the extent that it prohibits you from “[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval.”

WE WILL furnish all of you with inserts for the current Employee Code of Conduct that (1) advise that the unlawful provisions above have been rescinded, or (2) provide the language of lawful provisions, or WE WILL publish and distribute a revised Employee Code of Conduct that (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

A.W. FARRELL & SON, INC.

The Board’s decision can be found at [www.nlr.gov/case/28-CA-085434](http://www.nlr.gov/case/28-CA-085434) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Gregory M. Gleine, Nathan A. Higley, and Larry A. Smith, Esqs.,<sup>1</sup> for the Acting General Counsel.  
Heidi Nunn-Gilman and Julie A. Pace, Esqs. (The Cavanaugh Law Firm, PA), for A.W. Farrell & Son, Inc.

<sup>1</sup> Smith and Higley litigated the CB cases, while Gleine litigated the CA case.

David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld, P.C.), for the United Union of Roofers, Waterproofers and Allied Workers, Local 162.

## DECISION

### STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. On November 29 and 30, 2012, these consolidated cases were tried in Las Vegas, Nevada. The complaint in Case 28–CA–085434 alleged that A.W. Farrell & Son, Inc. (Farrell) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by: maintaining unlawful personnel policies; and unilaterally assigning all bargaining unit work outside of the unit represented by United Union of Roofers, Waterproofers and Allied Workers, Local 162 (Roofers Local 162). The complaint in Cases 28–CB–080496 and 28–CB–085690 alleged that Roofers Local 162 violated Section 8(b)(3) by failing to provide relevant requested information to, and bargaining in bad faith with, Farrell.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties’ briefs, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

At all material times, Farrell, a corporation, with offices throughout the United States, including its office and place of business in Las Vegas, Nevada (the facility), has operated a commercial roofing business. Annually, it performs services valued in excess of \$50,000 outside of Nevada. Based upon the foregoing, the parties admit, and I find, that Farrell is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7). The parties also admit, and I find, that Roofers Local 162 is a labor organization, within the meaning of Section 2(5).

#### II. ALLEGED UNFAIR LABOR PRACTICES

The majority of the controlling facts are undisputed.<sup>2</sup> Farrell, a national operation, has collective-bargaining relationships with several unions. This dispute arose, when two of its unions, Roofers Local 162 and SMW Local 88,<sup>3</sup> raised competing claims over its Las Vegas area roofing work.

##### *A. Genesis of Roofers Local 162’s Relationship with Farrell*

On June 27, 2007, Farrell entered into a collective-bargaining agreement with Roofers Local 162, which ran from August 1, 2005, to July 31, 2007 (the Roofers Local 162: 05-07 CBA), and covered the following unit (the Roofers unit):

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers

<sup>2</sup> Unless otherwise explained, factual findings arise from admissions, joint exhibits, stipulations, and uncontroverted testimony.

<sup>3</sup> Although the complaint identified the Sheet Metal Workers International Association, AFL–CIO, Local Union No. 88 (SMW Local 88) as a party-in-interest, they did not participate in the hearing.

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and any person performing the duties of all safety monitoring of work, excluding managers, guards and supervisors . . .

(Jt. Exhs. 96, 105, 119.) Farrell subsequently entered into a successor agreement with Roofers Local 162, which ran through July 31, 2010 (the Roofers Local 162: 07-10 CBA). (Jt. Exh. 89.) These agreements covered Las Vegas and the surrounding vicinity. (Id.)

*B. Origin of the Sheet Metal Workers' Relationship with Farrell*

Farrell similarly maintained a bargaining relationship with the Sheet Metal Workers International Association, AFL-CIO-CLC, Local Union No. 112 (SMW Local 112), which is located in upstate New York. Since 1979, it has been a party to consecutive contracts with SMW Local 112, including a May 1, 2007, to April 30, 2010 contract (the SMW Local 112: 07-10 CBA), which covered this unit (the SMW Local 112 unit):

All employees . . . engaged in . . . metal roofing; and . . . all other work included in the jurisdiction claims of Sheet Metal Workers' International Association.

(Jt. Exhs. 111-113.)

In a somewhat unique provision, the SMW Local 112: 07-10 CBA obligated Farrell to use SMW Local 112's workers, or workers from affiliated locals, for roofing jobs *outside of* upstate New York. This odd clause (the Travelers Clause) triggered the instant dispute over who held the right to perform Farrell's Las Vegas projects. Specifically, the Travelers Clause stated:

When the Employer has any [SMW Local 112 unit work] . . . to be performed outside the area covered by this Agreement and **within the area covered by another agreement with another union affiliated with the Sheet Metal Worker's International Association [i.e. SMW Local 88],** and qualified sheet metal workers are available in such area, the Employer may send no more than two (2) sheet metal workers per job into such area to perform any work which the Employer deems necessary, both of whom shall be from the Employer's home jurisdiction. **All additional sheet metal workers shall come from the area in which the work is to be performed.** . . .

(Jt. Exh. 111 at art. VIII, sec. 6) (emphasis added). After discovering that Roofers Local 162 was performing roofing work in Las Vegas for Farrell, SMW Local 88, the Las Vegas local affiliated with SMW Local 112, claimed the right to perform this work.

*C. SMW's Local 88 Discovers Farrell's Las Vegas Operations: ULP Litigation, Grievance and Settlement*

In June 2009, SMW Local 88 learned that Roofers Local 162 was performing roofing work for Farrell in Las Vegas, which they considered theirs under the Travelers Clause. SMW Local 88 responded to this dilemma with a two-pronged attack: it filed an information request about Farrell's Las Vegas jobs; as well as a grievance alleging a breach of the Travelers Clause. (Jt. Exhs. 111-113.) Farrell denied the grievance, which result-

ed in its elevation under the grievance procedure, and rejected the information request, which resulted in litigation. (Id.)

*1. Unfair labor practice litigation*

Farrell lost this litigation. On November 18, 2010, Administrative Law Judge (ALJ) Parke issued a decision holding that Farrell must provide the requested information to SMW Local 88, in order to permit it to pursue its Travelers Clause grievance (Decision I). (Jt. Exh. 113.)

*2. Grievance*

Farrell was equally unsuccessful in defending the Travelers Clause grievance, which was sustained by the Local Joint Adjustment Board, which awarded damages of \$514,933.46.<sup>4</sup> (Jt. Exh. 115.) Farrell appealed this award to the National Joint Adjustment Board. (Id.)

*3. Global settlement*

In February 2011, before filing exceptions to Decision I, Farrell and SMW Local 88 settled the Decision I litigation and Travelers Clause grievance. (Jt. Exh. 115.) The settlement provided, *inter alia*, that:

- Farrell would recognize SMW Local 88 as the exclusive collective bargaining representative of its Las Vegas workers performing roofing work and enter into a labor agreement; and
- SMW Local 88 would withdraw its unfair labor practice charge and grievance.

(Jt. Exh. 115.) On March 16, 2011, the Board remanded the case to the Regional Director, in order to effectuate compliance with the settlement.<sup>5</sup> (Jt. Exh. 114.)

*4. SMW Local 88's new collective-bargaining agreement*

In April 2011, Farrell and SMW Local 88 signed a new labor contract (the SMW Local 88 CBA), which wholly eviscerated the Roofers unit. (Jt. Exh. 90.) This new unit (the SMW Local 88 unit) covered:

[A]ll skilled roofers and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work performed within the jurisdiction of this Article [in the State of Nevada]. The work jurisdiction of the Union shall be all roofing and waterproofing systems . . .

(Id.; Jt. Exh. 61.)

*D. Expiration of Roofers Local 162: 07-10 CBA and succeeding events*

*1. Failed negotiations*

Prior to the July 31, 2010 expiration of the Roofers Local 162: 07-10 CBA (i.e., *before* Farrell's settlement with SMW

<sup>4</sup> Although the exact date of the award cannot be gleaned from the record, it occurred prior to February 2011.

<sup>5</sup> On May 3, 2011, SMW Local 88 withdrew the underlying charge. (Jt. Exh. 116.) On June 3, 2011, Region 28 issued an Order Approving Withdrawal of Charge and Closing Case. (Id.)

Local 88), Roofers Local 162 met with Farrell to negotiate a successor agreement.<sup>6</sup> (Jt. Exhs. 96, 101, 119.) On August 17, 2010, bargaining yielded an agreement, which ran from September 1, 2010, to July 31, 2012 (the Roofers Local 162:10-12 CBA). (Id.) Farrell, however, subsequently refused to sign the contract. (Id.) Farrell's recalcitrance concerning the execution of the contract occurred *after* SMW Local 88 began its campaign to seize Farrell's Las Vegas area work under the Travelers Clause.

## 2. Termination of relationship

On April 28, 2011 (i.e., *shortly after* Farrell's execution of the SMW Local 88 CBA covering its Las Vegas roofing work), Farrell brusquely divorced Roofers Local 162, and announced that it was ending their relationship pursuant to Section 8(f), effective April 30, 2011. (Jt. Exh. 1.) In vain, Roofers Local 162 filed several unanswered information requests. (Jt. Exhs. 96, 119.) On the same date, SMW Local 88 delivered the coup de grâce in its battle to seize Farrell's Las Vegas area work, and faxed six member resignation letters to Roofers Local 162, which were signed by the same employees who previously comprised the Roofers unit.<sup>7</sup> (Jt. Exh. 100.) Farrell simultaneously ceased paying dues to the Southern Nevada Roofers J.A.T.C. Apprenticeship Committee, which were required under the expired Roofers Local 162: 07-10 CBA. (Jt. Exhs. 124-25.)

## 3. Litigation

Farrell's ongoing refusal to sign the Roofers Local 162: 10-12 CBA, withdrawal of recognition, and unwillingness to supply information prompted another round of litigation. (Jt. Exhs. 4-5, 96, 119.) In a decision dated December 28, 2011 (Decision II), ALJ Parke held, inter alia, that: Roofers Local 162 has been the 9(a) representative of the Roofers unit since 2007;<sup>8</sup> and Farrell unlawfully withdrew recognition from Roofers Local 162.<sup>9</sup> (Jt. Exh. 96.) Roofers Local 162 filed exceptions to Decision II,<sup>10</sup> which are pending before the Board.<sup>11</sup> Ironically, Decision II, particularly its conclusion that Roofers Local 162 was the 9(a) representative, followed Farrell locking into the SMW Local 88 CBA, which placed it in the unenviable posi-

tion of being contractually obligated to two distinct labor organizations.<sup>12</sup>

## 4. Bargaining

On January 4, 2012, Roofers Local 162 sent the following letter to Farrell:

Roofers Local 162 demands that the company comply with the decision of the Administrative Law Judge. This includes providing the information and signing the document which was proffered to Farrell.

The Union demands negotiations and requests that you provide dates when your client will be available for such negotiations.

(Jt. Exh. 13.) On January 13, 2012, Farrell responded:

Farrell is prepared to accept Judge Parke's recommended order in its totality and, therefore, will not file exceptions, but would proceed to commence bargaining with Roofers Local 162. Does Local 162 also accept the Judge's decision? Will Local 162 file exceptions? Whether bargaining makes any sense depends on Local 162's answer to these questions . . .

(Jt. Exh. 14.) On January 27, 2012, Roofers Local 162 clarified its position and confirmed that it still believed that Farrell was obligated to sign the Roofers Local 162: 10-12 CBA. (Jt. Exh. 15.)

On February 1 and 20, 2012, Farrell advised Roofers Local 162 that it desired to bargain and proposed various dates. (Jt. Exhs. 16-17.) Although Roofers Local 162 initially committed to meet on February 22, it later cancelled. (Jt. Exhs. 18-23.) The parties, thereafter, haggled over scheduling issues for the next several months, with Roofers Local 162 insisting that Farrell sign the Roofers Local 162: 10-12 CBA, before it would begin bargaining. (See Jt. Exhs. 27, 33-34, 38-40, 46-47.)

On July 14, 2012, Farrell and Roofers Local 162 finally met. (Jt. Exh. 62.) President Thomas Nielson, Business Manager Modesto Gaxiola, and Attorney David Rosenfeld represented Roofers Local 162, while Attorney Julie Pace and her legal assistant represented Farrell. This session produced little, if any, progress, and was marred by profanity, accusations and ad hominem attacks. The parties subsequently failed to schedule additional sessions, with each blaming the other for the logjam. (Jt. Exhs. 65-67, 69, 79, 80-84, 87.)

## 5. Farrell's ongoing failure to recognize Roofers Local 162

Since Farrell's initial termination of its bargaining relationship with Roofers Local 162 in April 2011, it has continuously failed to apply the terms of the expired Roofers Local 162: 07-10 CBA to the Roofers unit, or otherwise recognize Roofers Local 162 as a 9(a) representative. Farrell has, instead, contin-

<sup>6</sup> Roofers Local 162 simultaneously bargained with Farrell and several other Las Vegas roofing contractors.

<sup>7</sup> The letters stated, "I hereby resign my membership in Roofers Local 162 effective immediately."

<sup>8</sup> ALJ Parke held that the recognition clause in the Roofers Local 162: 07-10 CBA created a 9(a) bargaining relationship. (See Jt. Exhs. 89 at 1 (art. I, Recognition), 96 at 6 (relying upon *Saylor's, Inc.*, 338 NLRB 330, 334 (2002) (holding that a 9(a) relationship may be established by a contractual provision stating that the employer recognized the union as the 9(a) representative of bargaining unit employees, by virtue of its demonstration of majority support).)

<sup>9</sup> ALJ Parke also held that Farrell legitimately refused to sign the Roofers Local 162: 10-12 CBA.

<sup>10</sup> In its exceptions, Roofers Local 162 primarily asserted that Farrell and Roofers Local 162 reached an agreement in July 2010, and that ALJ Parke erred when she held that Farrell lawfully refused to sign the Roofers Local 162: 10-12 CBA.

<sup>11</sup> Notably, neither Farrell nor the Acting General Counsel filed any exceptions to Decision II.

<sup>12</sup> Although hindsight is 20-20, it remains unclear why Farrell never filed an unfair labor practice charge alleging that SMW Local 88's attempt to enforce the Travelers Clause in Las Vegas was unlawful, given that this action was clearly designed to circumnavigate Roofers Local 162's superior 9(a) status.

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uously applied the SMW Local 88 CBA to its roofing employees.<sup>13</sup> (See Jt. Exh. 61.) By way of example, the following

chart describes Farrell's roofing employees, who were previously represented by Roofers Local 162, and have, since May 2011, been represented by SMW Local 88:

<sup>13</sup> Julie Pace, Farrell's attorney, testified that Roofers Local 162 has not represented Farrell's workers since SMW Local obtained representational rights in May 2011. Gaxiola and Rosenfeld corroborated this point.

<b>Employee Name</b>	<b>Hire Date</b>	<b>Term. Date</b>	<b>Resignation from Roofers Local 162</b>	<b>First Appearance on Sheet Metal Workers Local 88 Fringe Benefit Remittance Report</b>
Camacho	9/9/10	8/20/12	May 2011	June 2011
Cruz-Garcia	9/13/10	N/A	May 2011	June 2011
Madrid-Pinon	9/11/10	N/A	May 2011	June 2011
Rodriguez	9/9/10	N/A	May 2011	June 2011
Ruiz	6/25/07	N/A	May 2011	June 2011
Sida	6/25/07	N/A	May 2011	June 2011
Bass	6/11/12	N/A	N/A	No record
Guítierrez-Quinones	6/11/12	N/A	N/A	No record

(Jt. Exh. 94–95, 100, 117, 120, 126.)

*E. Farrell's Information Requests*

On August 10, 2011, Farrell's attorney, Pace, sent this request to Roofers Local 162:

With respect to each plan [i.e. National Roofers Union Health and Welfare Fund (the Health Fund), National Roofing Industry Pension Fund (the Pension Fund), Roofers & Waterproofers Research & Education Joint Trust Fund (the Research Fund), and the Southern Nevada Roofers Joint Apprenticeship Training Committee (the Apprentice Fund)] to which contributions are required under the expired Local 162 agreement, please provide copies of the following documents:

- 1) the latest updated summary plan description;
- 2) the full plan document, with all amendments;

- 3) the latest annual report (Form 5500), together with all schedules, attachments and exhibits;
- 4) any and all trust agreement(s);
- 5) any and all administration contract(s);
- 6) any and all actuary, accountant, attorney or consultant contract(s), letter(s) of engagement, retainer agreement(s) or other forms of contracts to provide such professional services to the plan;
- 7) any and all agreements with providers of professional medical or other health care services, or with representatives or organizations of such providers, or with arrangers for the provision of health care services; and
- 8) any and all other contracts or instruments under which the plan is established or operated.

(Jt. Exh. 6.) The following chart summarizes the parties' resulting communications:

<b>Date</b>	<b>From</b>	<b>To</b>	<b>Description</b>	<b>Exhibits</b>
Aug. 25, 2011	Farrell	Roofers Local 162	2 <sup>nd</sup> request for information	(JT Exh. 7)
Aug. 31, 2011	Roofers Local 162	Farrell	Commitment to ask "Trust Funds" for information	(JT Exh. 8)
Sep. 14, 2011	Farrell	Roofers Local 162	3 <sup>rd</sup> request for information	(JT Exh. 9)
Sep. 29, 2011	Roofers Local 162	Farrell	2 <sup>nd</sup> commitment to ask "Trust Funds" for information	(JT Exh. 10)

Jan. 13, 2012	Farrell	Roofers Local 162	4 <sup>th</sup> request for information	(JT Exh. 14)
Jan. 27, 2012	Roofers Local 162	Farrell	Enclosed summary plan description for the Health Fund	(JT Exh. 15)
Feb. 21, 2012	Farrell	Roofers Local 162	5 <sup>th</sup> request for information, which pointed out that Roofers Local 162 provided items 1 and 2, but omitted items 3 to 8 for the Health Fund, and neglected to supply everything else	(JT Exh. 22)
Feb. 24, 2012	Roofers Local 162	Farrell	3 <sup>rd</sup> commitment to ask “Trust Funds” for remaining information	(JT Exh. 25)
Feb. 28, 2012	Farrell	Roofers Local 162	6 <sup>th</sup> request for unsupplied information	(JT Exh. 26)
Jun. 15, 2012	Roofers Local 162	Farrell	4 <sup>th</sup> commitment to ask “Trust Funds” for remaining information, and suggestion to obtain Form 5500’s online	(JT Exh. 48)
June 17, 2012	Roofers Local 162	Farrell	E-mail enclosing Pension Fund Trust Agreement, i.e. Items 1 and 2	(JT Exh. 49)
June 19, 2012	Roofers Local 162	Farrell	E-mail enclosing Health Fund Trust Agreement, i.e. Items 1 and 2	(JT Exh. 51)
June 25, 2012	Farrell	Roofers Local 162	7 <sup>th</sup> request for information, which stated that it needed 6 of 8 items for Health and Pension Funds, and lacked all Research and Apprentice Fund documents	(JT Exh. 52)
July 10, 2012	Roofers Local 162	Farrell	5 <sup>th</sup> commitment to ask “Trust Funds” for missing information	(JT Exhs. 58-59)
July 27, 2012	Roofers Local 162	Farrell	Stating that Pension Fund would not provide additional information	(JT Exh. 63)
Aug. 8, 2012	Roofers Local 162	Farrell	Enclosing Form 5500 for Health Fund, i.e. item 3	(JT Exh. 71)
Aug. 22, 2012	Roofers Local 162	Farrell	Stating that Health Fund would only release the Trust document, Form 5500, and Summary Plan	(JT Exh. 74)
Various dates	Farrell	Roofers Local 162	Ongoing objections to responses	(JT Exhs. 77, 88)
Sep. 24, 2012	Roofers Local 162	Farrell	Enclosing Agreement and Declaration of Trust for Apprentice Fund	(JT Exh. 86)

#### *F. Employee Code of Conduct*

Farrell maintains an Employee Code of Conduct (the Employee Code). (Jt. Exh. 93.) Since January 16, 2012, it has applied the Employee Code in these offices: Dunkirk and Elmi-

ra, New York; Erie, Pennsylvania; and Cleveland and Cincinnati, Ohio. (Jt. Exhs. 73, 105.)<sup>14</sup>

<sup>14</sup> Although Farrell initially denied that it maintained the policies at these locations, it amended its Answer at the hearing and admitted that the policies were maintained at these sites in violation of Sec. 8(a)(1). (Tr. 146–49.)



## A. W. FARRELL &amp; SON, INC.

## 1. Disciplinary procedures

Under *Disciplinary Procedures*, the Employee Code provides:

Types of behavior and conduct that . . . would lead to disciplinary action up to and including termination of employment without prior warning at the sole discretion of the Company include, but are not limited to the following:

- . . . **Solicitation/Distribution**
- . . . **Conduct deemed inappropriate by the Company** . . .

(Jt. Exh. 93) (emphasis added).

## 2. Electronic communication

Under *Electronic Communication*, the Employee Code states:

**Acceptable Use Guideline**

This guideline is designed to assist employees in the effective, appropriate use of electronic communications in conducting company business . . .

Communications tools provided by the Company include, but are not limited to: telephone, voice mail, E-mail, internet, intranet and fax . . .

Failure to follow this guideline can lead to disciplinary actions up to and including dismissal.

**Inappropriate Uses of Electronic Communication**

1. Inappropriate use includes, but is not limited to: . . .

- **Revealing company private, confidential, copyrighted or employee information in external communication without the required approval** . . .

(Jt. Exh. 93) (emphasis added).

## III. ANALYSIS

*A. The 8(a)(1) Allegations*<sup>15</sup>

The contested Employee Code policies were unlawful. The Board has found that:

[T]he appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. If the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, “the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

<sup>15</sup> These allegations are listed under pars. 5 and 7 of the complaint in Case 28–CA–085434. Farrell, as noted, admitted that these policies were unlawful. (Tr. 146–48.)

*Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 2 (2012) (citations omitted).

## 1. Disciplinary procedures

The *Disciplinary Procedures* policy is unlawful in two ways. First, it illegally banned employees from engaging in “conduct deemed inappropriate by the Company.” See *Costco Wholesale Corp.*, supra, slip op. at 2 (“statements posted electronically . . . that damage the Company”); *Knauz BMW*, 358 NLRB No. 164 (2012) (“courtesy rule,” which prohibited “disrespectful” conduct and “language which injures the image or reputation of the Dealership”).<sup>16</sup> Second, it improperly prohibited “solicitation/distribution.” See *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (citations omitted) (“[A] no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful [because such a rule] . . . tends to restrain and interfere with employees’ rights under the Act, even if the rule is not enforced.”).<sup>17</sup>

## 2. Electronic communication

The *Electronic Communication* policy was illegitimate because it bars employees from “[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval.” See *Trump Marina Casion Resort*, 355 NLRB 585 (2010). The Board has held that preauthorization requirements unduly interfere with employees’ Section 7 rights to “improve terms and conditions of employment” by seeking assistance “outside the immediate employee-employer relationship.” See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566, 569–570 (1978); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007); *Handicabs, Inc.*, 318 NLRB 890, 896 (1995), *enfd.* 95 F.3d 681 (8th Cir. 1996).

*B. The 8(a)(5) Allegations*<sup>18</sup>

The 8(a)(5) allegation cannot be sustained on the basis of collateral estoppel. The Acting General Counsel has alleged that Farrell has wholly repudiated its collective-bargaining relationship with Roofers Local 162, in violation of Section 8(a)(5) by: assigning all Roofers unit work to employees working under the SMW Local 88 CBA; and continuously failing to adhere to the Roofers Local 162: 07-10 CBA.

In her opening, Farrell’s attorney raised collateral estoppel and contended that:<sup>19</sup>

<sup>16</sup> See also *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), *enfd.* in relevant part 916 F.2d 932, 940 (4th Cir. 1990) (“derogatory attacks on . . . hospital representative[s]”); *Claremont Resort & Spa*, 344 NLRB 832 (2005) (“negative conversations about associates and/or managers”).

<sup>17</sup> See also *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994) (rule banning union activities during “Company time” are presumptively invalid because they fail to clearly convey that solicitation can still occur during breaks and other nonworking hours at the enterprise); *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) (rule threatening discipline for “[p]erforming activities other than Company work during working hours”).

<sup>18</sup> These allegations are listed under pars. 6 and 8 of the complaint in Case 28–CA–085434.

<sup>19</sup> Collateral estoppel concerning Decision II was also raised by the other litigants. First, Roofers Local 162 asserted that Farrell was col-

[Roofers Local 162] . . . is trying to get a second bite at the apple . . . . [They had a] hearing with Judge Parke on the second . . . case [i.e. Decision II]. It's the same Judge who heard everything and we need to read all that consistently. . . . [They're] trying to have the court . . . revisit some of the decisions she made.

(Tr. 128-29.)

Under the collateral estoppel doctrine, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Big D Service Co.*, 293 NLRB 322, 323 (1989), citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fn. 5 (1979), and *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1015-1016 (6th Cir. 1983).<sup>20</sup> An issue is "necessarily determined," if its adjudication was necessary to support the judgment entered in the prior proceeding. *Marlene Industries*, supra, 712 F.2d at 1015.

Collateral estoppel is appropriate herein for several reasons.<sup>21</sup> First, the identical parties litigated Decision II. Second, they collectively placed the entire record connected to Decision II in the instant record. Finally, ALJ Parke made a conclusive and final determination in Decision II on the very same issue, which is present herein.<sup>22</sup> Specifically, in Decision II, ALJ Parke held, inter alia, that: since 2007, Roofers Local 162 has been the 9(a) collective-bargaining representative of the Roofers unit; and Farrell has been under a continuing obligation, which survived the expiration of the Roofers Local 162: 07-10 CBA to apply the terms of this contract. In conferring 9(a) status upon Roofers Local 162,<sup>23</sup> ALJ Parke very clearly precluded Farrell from: executing 8(f) agreements with other unions (i.e., SMW Local 88), which duplicated the work performed by the Roofers unit; or wholly repudiating the Roofers Local 162: 07-10 CBA, under the guise that it had the retained right to sign

a 8(f) agreement with another union (i.e., SMW Local 88) covering the same work.<sup>24</sup> Simply put, the instant complaint allegation covers the same all-inclusive, uninterrupted refusal by Farrell to recognize Roofers Local 162 as the 9(a) representative,<sup>25</sup> and ongoing wholesale repudiation of the Roofers Local 162: 07-10 CBA that was litigated in Decision II.<sup>26</sup> This conduct commenced with Farrell's unlawful withdrawal of recognition on April 28, 2001, and has, to date, remained unchanged. This continuous pattern was adjudicated in Decision II and will be fully remedied by the Board, once it considers Roofers Local 162's Exceptions and issues an Order.<sup>27</sup> The Board's remedy will necessarily encompass the remedies sought herein. I find, as a result, that the Acting General Counsel cannot raise the same total contract repudiation allegations that were litigated before ALJ Parke in Decision II in this case under the cloak of analogously-worded pleadings,<sup>28</sup> and that judicial economy favors collateral estoppel.<sup>29</sup>

<sup>24</sup> See *VFL Technology Corp.*, 329 NLRB 458, 459 (1999) (once a union obtains 9(a) status during the term of an 8(f) agreement, the relationship becomes a 9(a) relationship and the employer is bound by 9(a)'s postexpiration bargaining obligations); *Freeman Decorating Co.*, 336 NLRB 1 (2001), enf. denied on other grounds 334 F.3d 27 (D.C. Cir. 2003) (employer violates Sec. 8(a)(5) by recognizing another union under Sec. 8(f), when it was still obligated to bargain with its existing 9(a) bargaining representative); see also *Gem Management Co.*, 339 NLRB 489, 500-501 (2003), enf. 107 Fed. Appx. 576 (6th Cir. 2004) (employer violates Sec. 8(a)(5) by failing to apply the terms and conditions of an existing 8(f) agreement to a jobsite that fell within the agreement's jurisdiction, giving another union the opportunity to sign up members at that jobsite, and paying benefits into that union's benefit funds); *Bell Energy Management Corp.*, 291 NLRB 168, 169 fn. 8 (1988); *Ana Colon, Inc.*, 266 NLRB 611, 612-613 (1983).

<sup>25</sup> See also *A & L Underground*, 302 NLRB 467, 469 (1991) (holding that, where, "the Respondent sent a letter that severed the bargaining relationship in one stroke, . . . its failure to apply the contract thereafter is little more than the effect or result of that action"). I conclude, as a result, that the April 28, 2011 withdrawal of recognition allegation that was adjudicated in Decision II necessarily encompassed the unlawful subcontracting allegation at issue herein.

<sup>26</sup> This case would present a novel issue unsuitable for collateral estoppel, if there had been a temporal lapse in, and subsequent resumption of, Farrell's unlawful conduct (e.g., it recognized Roofers Local 162 as the 9(a) representative, restored their work, complied with the expired Roofers Local 162: 07-10 CBA, and, thereafter, unilaterally signed the SMW Local 88 CBA). This case might similarly present a novel issue unsuitable for collateral estoppel, if Roofers Local 162 filed a timely charge alleging that Farrell's conduct regarding SMW Local 88 violated Sec. 8(a)(2).

<sup>27</sup> Roofers Local 162 is collaterally estopped from raising that Farrell reached an agreement with it in July 2010 (i.e., Roofers Local 162: 10-12 CBA). This matter is squarely before the Board in its exceptions to Decision II.

<sup>28</sup> In is also noteworthy that, even in the absence of the parties raising collateral estoppel as an affirmative defense, it would remain appropriate to apply this doctrine sua sponte under the current circumstances. See *U.S. v. Sioux Nation of Indians*, 448 U.S. 371, 432 (1980) ("While *res judicata* is a defense which can be waived, . . . if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised."); *In re Medomak*, 922 F.2d 895, 904 (1st Cir. 1990) ("Even if appellees waived *res judicata* as an affirmative defense, a court on notice that it has previously decided an issue may dismiss the

laterally estopped from taking any actions contrary to Decision II because, "they didn't take any exception to what the Judge did . . . . [t]hey're stuck with . . . an ALJ's Decision, which will become a Board Order." (Tr. 44-45.) Second, the parties collectively supported collateral estoppel by submitting Decision II, the underlying administrative record and exceptions as joint exhibits herein.

<sup>20</sup> See also *Sabine Towing & Transportation Co.*, 263 NLRB 114, 120 (1982) (collateral estoppel bars relitigation of issues previously decided against the General Counsel).

<sup>21</sup> Counsel for the Acting General Counsel's request for an adverse inference under *Bannon Mills*, 146 NLRB 611 (1964), is, consequently, denied.

<sup>22</sup> Farrell, as noted, did not file exceptions to Decision II.

<sup>23</sup> Sec. 9(a) of the Act provides, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the **exclusive** representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Emphasis added.)

### C. The 8(b)(3) Allegations<sup>30</sup>

#### 1. Information requests

Roofers Local 162 violated Section 8(b)(3) of the Act, when it failed to furnish certain information to Farrell, and unreasonably delayed its provision of other responsive documents. A labor organization's statutory duty to furnish information is "commensurate with and parallel to an employer's obligation to furnish it to a union pursuant to Sec. 8(a)(5) and (1) of the Act." *Teamsters Local 500 (Acme Markets)*, 340 NLRB 251, 252 (2003). Unions must, therefore, provide information, which is relevant to the administration of a collective-bargaining agreement. See *Washington Beef, Inc.*, 328 NLRB 612, 617-618 (1999). Relevance is gauged under a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Information about the terms and conditions of employment of the bargaining unit is presumptively relevant and must be provided upon request. *Bridge, Structural and Ornamental Iron Workers Local 207 (Steel Erecting Contractors)*, 310 NLRB 87, 91 (1993), and cases cited therein at fn. 8. In addition, the unreasonable delay in supplying information "is as much of a violation of . . . the Act as a refusal to furnish the information at all." *Woodland Clinic*, 331 NLRB 735, 736 (2000), citing *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). Month-plus delays, which are unaccompanied by legitimate excuse, are generally unlawful.<sup>31</sup>

Roofers Local 162 violated Section 8(b)(3), when it failed to provide information requested by Farrell concerning its Health Fund, Pension Fund, Research Fund, and Apprentice Fund (collectively called the Funds), and unreasonably delayed providing other connected documents. On August 10, 2011, Farrell requested several categories of information connected to the Funds. Roofers Local 162, without explanation, delayed by 5 to 13 months in fulfilling certain portions of the request, and has, to date, neglected to fulfill the remaining portions. The requested information was clearly relevant, inasmuch as it relates to the Roofers unit's terms and conditions of employment. Although Roofers Local 162 has averred that the Funds would not provide certain information, it failed to: establish what efforts, if any, it made to secure such information beyond submitting a letter; show that it had no way to compel the Funds to

produce the information; or demonstrate that it was unable to obtain the documents in an alternative manner. I find, as a result, that Roofers Local 162 violated Section 8(b)(3) in its handling of the information request.

#### 2. Failure to bargain

Roofers Local 162's bargaining conduct did not, however, violate Section 8(b)(3). Section 8(d) defines bargaining collectively as:

[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement . . . .

A union, consequently, violates Section 8(b)(3) by failing and refusing to meet with reasonable promptness and frequency with a company's bargaining representative. See *People Care, Inc.*, 327 NLRB 814, 825 (1999); *AAA Motor Lines, Inc.*, 215 NLRB 789, 791 (1974). In assessing whether a party has failed to bargain in good faith, the Board examines the totality of their conduct, both at, and away from, the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991).<sup>32</sup>

Under certain circumstances, however, one bargaining partner's misconduct during negotiations might suspend the other's bargaining obligations, or excuse what otherwise might be an unfair labor practice. See, e.g., *Times Publishing Co.*, 72 NLRB 676, 683 (1947) (union's bad faith precludes testing employer's good faith); *Continental Nut*, 195 NLRB 841 (1972) (same); *Phelps Dodge Copper Products*, 101 NLRB 360 (1952) (union's unprotected slowdown suspends bargaining obligation until unprotected conduct ends); *Arundel Corp.*, 210 NLRB 525 (1974) (union's strike contrary to no-strike extension of contract privileges company's refusal to bargain); *Young & Hay Transportation Co.*, 214 NLRB 252 (1974), *affd.* 522 F.2d 562 (8th Cir. 1975) (union's intractable insistence on changing recognized bargaining unit privileged unilateral changes); *Louisiana Dock Co.*, 293 NLRB 233, 235 (1989), *affd.* in pertinent part 909 F.2d 281 (7th Cir. 1990) (same); *New Brunswick General Sheet Metal Works*, 326 NLRB 915 (1998) (union's improper exclusion of employer's attorney from negotiations privileged unilateral changes proposed during bargaining).

Although Roofers Local 162 would have generally violated the Act, when it unreasonably delayed scheduling bargaining

action sua sponte, consistent with the *res judicata* policy of avoiding judicial waste."); *Sahlahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993) ("The failure of a defendant to raise *res judicata* in answer does not deprive a court of the power to dismiss a claim on that ground.").

<sup>29</sup> Collateral estoppel saves the Board from the unnecessary exercise of synthesizing potentially conflicting ALJ decisions on identical matters. Moreover, although there might be a few more facts available in this case due to the passage of time, such facts are not controlling.

<sup>30</sup> These allegations are listed under pars. 6 and 7 of the complaint in Cases 28-CB-080496 and 28-CB-085690.

<sup>31</sup> See, e.g., *Pan American Grain*, 343 NLRB 318 (2004), *enfd.* in relevant part 432 F.3d 69 (1st Cir. 2005) (3-month delay); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (2-month delay); *Woodland Clinic*, *supra* at 737 (7-week delay); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (6-week delay); *International Credit Service*, 240 NLRB 715, 718 (1979) (6-week delay); *Pennco Inc.*, 212 NLRB 677, 678 (1974) (1-month delay).

<sup>32</sup> See, e.g., *Mid-Continent Concrete*, *supra* at 260-261 (refusal to provide explanations for proposals and orchestrated delay tactics were evidence of bad-faith bargaining); *People Care, Inc.*, 327 NLRB 814, 825 (1999) (respondent's unreasonable refusal to accede to union's requests for more frequent meetings was evidence of bad-faith bargaining) (citing *Calex Corp.*, 322 NLRB 977 (1997), *enfd.* 144 F.3d 904 (6th Cir. 1998)); see also *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995) (finding, *inter alia*, respondent's canceling of bargaining sessions, limiting the duration of meetings, and delaying the scheduling of future meetings indicative of bad-faith bargaining).

sessions with Farrell, cancelled scheduled meetings, insisted that Farrell sign the Roofers Local 162: 10-12 CBA before it might bargain, verbally abused Farrell's representative at a bargaining session, and failed to arrange a followup session, this misconduct was excused by Farrell's ongoing derogation of its threshold duty to recognize Roofers Local 162 as the 9(a) representative of the Roofers unit. Farrell's commitment to follow Decision II and bargain in good faith with Roofers Local 162 was a sham, which has yielded the same pattern of unlawful conduct at issue in Decision II. Farrell remains unwilling to concede that 9(a) status forbids its ongoing application of the SMW Local 88 CBA to the Roofers unit. Thus, until such time as Farrell actually recognizes Roofers Local 162 as the 9(a) representative, ceases its wholesale evisceration of the Roofers unit and applies the Roofers Local 162: 07-10 CBA to the Roofers unit, Roofers Local 162's failure to meet in good faith at the bargaining table is highly rational, efficient, and excusable. Simply put, what should Roofers Local 162 negotiate over, while SMW Local 88 continues to perform their work?

#### CONCLUSIONS OF LAW

1. Farrell is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

2. Roofers Local 162 is a labor organization within the meaning of Sec. 2(5) of the Act.

3. Roofers Local 162 is, and, at all material times, was the exclusive 9(a) bargaining representative of the following appropriate unit at Farrell's Las Vegas, Nevada facility:

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards and supervisors as defined in the Act.

4. Farrell violated Section 8(a)(1) of the Act by maintaining a *Disciplinary Procedure* policy in its Employee Code at its Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities, which banned employees from engaging in "conduct deemed inappropriate by the Company" or "solicitation/distribution."

5. Farrell violated Section 8(a)(1) of the Act by maintaining a *Electronic Communication* policy in its Employee Code at its Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities, which prohibited employees from "[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval."

6. Roofers Local 162 violated Section 8(b)(3) of the Act by failing and refusing to provide relevant information, and unreasonably delaying its provision of other relevant information, which was requested in Farrell's August 10, 2011 letter.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Farrell committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As a re-

sult, it shall be ordered to post notices at its Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities, where the unlawful policies have been, or remain, in effect. See *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005). Its duty to rescind or modify the unlawful policies is governed by *Guardsmark LLC*, supra.<sup>33</sup> It shall also distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees at the affected facilities, in addition to the traditional physical posting of paper notices, if it customarily communicates with those workers in this manner.<sup>34</sup> See *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Having found that Roofers Local 162 committed an unfair labor practice, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To the extent that it has not already done so, Roofers Local 162 shall provide Farrell with the information requested in its August 10, 2011 letter. Lastly, under *J. Picini Flooring*, supra, in addition to the traditional physical posting of paper notices, Roofers Local 162 must distribute the attached notice to members and employees electronically, if it customarily communicates with such individuals in this manner.<sup>35</sup>

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>36</sup>

#### ORDER

A. A. W. Farrell & Son, Inc., Dunkirk, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a *Disciplinary Procedure* policy in its Employee Code at its Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities, which bans employees from engaging in "conduct deemed inappropriate by the Company" or "solicitation/distribution."

(b) Maintaining an *Electronic Communication* policy in its Employee Code at its Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities, which prohibits employees from "[r]evealing company private, confidential, copy-

<sup>33</sup> "The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees." *Guardsmark*, supra at 812 fn. 8.

<sup>34</sup> Farrell must post the notice to employees, which is found at App. A.

<sup>35</sup> Roofers Local 162 must post the notice to members and employees, which is found at App. B.

<sup>36</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## A. W. FARRELL &amp; SON, INC.

righted or employee information in external communication without the required approval”

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.<sup>37</sup>

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or modify the language in the following provisions of its Employee Code at its Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities

(1) The *Disciplinary Procedure* policy to the extent that it banned employees from engaging in “conduct deemed inappropriate by the Company” or “solicitation/distribution.”

(2) The *Electronic Communication* policy to the extent that it prohibited employees from “[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval.”

(b) Furnish all current employees at the Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities with inserts for the Employee Code that

(1) Advise that the unlawful rules have been rescinded.

(2) Provide the language of lawful rules or publish and distribute a revised Employee Code that

(i) Does not contain the unlawful rules.

(ii) Provides the language of lawful rules.

(c) Within 14 days after service by the Region, post at its at its Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati Ohio facilities, where its Employee Code is in effect, copies of the attached notice to employees, which is found at “Appendix A.”<sup>6</sup> Copies of the notice to employees, on forms provided by the Regional Director for Region 28, after being signed by Farrell’s authorized representative, shall be posted by Farrell and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physically posting paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Farrell customarily communicates with its employees at the affected facilities by such means. Reasonable steps shall be taken by Farrell to ensure that the notices are not altered, defaced, or covered by any other material. If Farrell has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the affected facilities at any time since March 24, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

<sup>37</sup> Given Farrell’s ongoing pattern of unlawful conduct, a broad cease-and-desist order is appropriate herein. See, e.g., *Regency Grande Nursing & Rehabilitation Center*, 354 NLRN 530, 531 fn. 10 (2009).

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

on a form provided by the Region attesting to the steps that Farrell has taken to comply.

B. United Union of Roofers, Waterproofers and Allied Workers, Local 162, Las Vegas, Nevada its officers, representative, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide relevant information, and unreasonably delaying its provision of other relevant information, requested in Farrell’s August 10, 2011 letter.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Unless it has already done so, furnish Farrell with the requested information.

(b) Within 14 days after service by the Region, post at its Las Vegas, Nevada hall and offices copies of the attached notice to members and employees found at “Appendix B.”<sup>7</sup> Copies of the notice to members and employees, on forms provided by the Regional Director for Region 28, after being signed by Roofers Local 162’s authorized representative, shall be posted by Roofers Local 162 and maintained for 60 consecutive days in conspicuous places, including all places where notices to members and employees are customarily posted. In addition to physically posting paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Roofers Local 162 customarily communicates with members and employees by such means. Reasonable steps shall be taken by Roofers Local 162 to ensure that the notices are not altered, defaced, or covered by any other material. If Roofers Local 162 has gone out of business or ceased operating the office involved herein, it shall duplicate and mail, at its own expense, a copy of the notice to all of its current and former members and employees at any time since August 10, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Roofers Local 162 has taken to comply.

Dated Washington, D.C. May 13, 2013

## APPENDIX A

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

<sup>7</sup> See fn. 39, supra.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a *Disciplinary Procedure* policy provision in our Employee Code of Conduct at our Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities, which bans employees from engaging in “conduct deemed inappropriate by the Company” or “solicitation/distribution.”

WE WILL NOT maintain an *Electronic Communication* policy provision in our Employee Code of Conduct, which bans employees from “[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval.”

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind or modify the language in the following provisions of our Employee Code of Conduct at our Dunkirk and Elmira, New York, Erie, Cleveland, and Cincinnati, Ohio facilities:

1. The *Disciplinary Procedure* policy to the extent that it prohibits you from engaging in “conduct deemed inappropriate by the Company” or “solicitation/distribution.”
2. The *Electronic Communication* policy to the extent that it prohibits you from “[r]evealing company private, confidential, copyrighted or employee information in external communication without the required approval.”

WE WILL furnish all of you with inserts for the current Employee Code of Conduct that:

1. Advise that the unlawful provisions above have been rescinded, or
2. Provide the language of lawful provisions, or publish and distribute revised Employee Codes of Conduct that:
  - a. Do not contain the unlawful provisions, or
  - b. Provide the language of lawful provisions.

A.W. FARRELL & SON, INC.

## APPENDIX B

NOTICE TO MEMBERS AND EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide, or unreasonably delay providing, A.W. Farrell & Son, Inc. with relevant requested information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, to the extent that we have not already done so, furnish A.W. Farrell & Son, Inc. with the information requested in its letter dated August 10, 2011.

UNITED UNION OF ROOFERS, WATERPROOFERS, AND ALLIED WORKERS, LOCAL 162

The Administrative Law Judge’s decision can be found at [www.nlrb.gov/case/28-CA-085434](http://www.nlrb.gov/case/28-CA-085434) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

